

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RYAN KERWIN	:	CIVIL ACTION
	:	
v.	:	NO. 03-5645
	:	
WILLIAM WOLFE, et al	:	

Diamond, J.

April 8, 2005

MEMORANDUM

Ryan Kerwin, acting *pro se*, petitions for a writ of habeas corpus, seeking relief from his state court convictions. 28 U.S.C. § 2254. The Magistrate Judge has recommended that I deny the writ. Petitioner objects to the Magistrate's conclusion that it was permissible to limit Kerwin's cross-examination of a witness Kerwin himself called at trial. I agree with the Magistrate, overrule Kerwin's objections, and deny the writ.

BACKGROUND

During Petitioner's 1999 trial, the Commonwealth of Pennsylvania alleged that on November 4, 1998, Kerwin argued with his roommate, Kenneth Good, and struck Good on the head with a hammer. Commonwealth v. Kerwin, No. 99-1130, unpub. Mem. at 1 (Ct. Com. Pl. Bucks Cty., Sept. 23, 1999). Petitioner fled and discarded the hammer, which authorities later recovered. Kerwin v. Varner, 2003 U.S. Dist. LEXIS 14741, *2 (E.D. Pa. 2003). On January 12, 1999, detectives found Petitioner at a hotel in Langhorne, Pennsylvania. Id. When they confronted Kerwin, he brandished a gun, and an armed standoff ensued. Id. at *2-3. Petitioner eventually surrendered and, as a result of the standoff, was charged with reckless endangerment and as a felon in possession of a firearm. Id. at *2; see also 18 Pa. C.S.A. § 2705; 18 Pa. C.S.A. § 6105. Petitioner

pled guilty to reckless endangerment, and was convicted of the weapons offense. Id. at *1.

The Commonwealth also charged Kerwin with aggravated assault and reckless endangerment for the attack on Good. The matter proceeded to a jury trial in the Bucks County Common Pleas Court. Id. The Commonwealth never called the victim Good as a trial witness. Rather, the prosecutor presented his case in chief through other witnesses.

After the Commonwealth rested, Petitioner called Good as a defense witness, and immediately tried to cross-examine him. (N.T. April 29, 1999 at 150:10-156:20). At the time of Petitioner's trial, Pennsylvania had recently adopted its own Rules of Evidence. See Clark v. Klem, 2004 U.S. Dist. LEXIS 4621, *23 n.6 (E.D. Pa. 2004) (Pennsylvania Supreme Court adopted Pennsylvania Rules of Evidence on May 8, 1998). Applying these Rules, the trial judge allowed defense counsel leeway in asking Good leading questions. (N.T. April 29, 1999 at 152:1-16; 154:10-18). Counsel also tried to cross-examine Good with his criminal record, which included juvenile adjudications for burglary, attempted theft, criminal trespass, and receiving stolen property. (N.T. April 29, 1999 at 158:10-17); Commonwealth v. Kerwin, No. 2986 EDA 2000, at 8 (May 9, 2001). Good's adult record included convictions for theft and burglary; in addition, he had new theft and burglary charges pending against him. (N.T. April 29, 1999 at 158:20-159:4). Defense counsel also sought to show that Good was on probation and parole at the time of the attack. (N.T. April 29, 1999 at 162:19-163:2). In considering counsel's requests, the trial judge noted:

Under the new rules of evidence, impeachment, even of one's own witness, is permissible by, in rather sweeping language, all methods of impeachment. However, in certain circumstances, and I deem this to be one of them, the court is to measure and balance the usefulness of the impeachment information against the prejudice to a party.

(N.T. April 29, 1999 at 157-58). After the trial judge deferred his ruling, defense counsel again

argued that the criminal record was admissible to challenge the credibility of Good, whose memory of the attack was spotty. (N.T. April 29, 1999 181:23-183:2). The trial judge ultimately agreed with the prosecutor, who argued that the credibility argument was a pretext for creating jury antipathy toward Good:

I do not believe that a witness can be called for a brief set of questions in which there may be one issue in which there's a collision of credibility, particularly when a witness is as confused as that witness appeared to be and injured as he was with the medical testimony I have heard as a pretext for bringing in prior criminal record which would tend to blacken his circumstance as a victim. I find it prejudicial. With regret, I find it pretextual.

(N.T. April 29, 1999 at 182:2-13). The judge also barred any evidence regarding Good's probation or parole. (N.T. April 29, 1999 at 182:14-183:2) (stating, "I have balanced it and I find that in all candor [introducing such evidence is] pretextual or certainly appears to be pretextual"). The trial judge nonetheless allowed Kerwin to challenge Good's credibility through other witnesses, who contradicted Good's version of significant events following the altercation with Kerwin. (N.T. April 29, 1999 at 167:2-15; 173:1-5). Accordingly, during her closing argument, defense counsel had an evidentiary foundation on which to base her vigorous attack on Good's credibility. (N.T. April 29, 1999 at 188:18-189:2; 201:8-12).

The jury convicted Kerwin of aggravated assault and reckless endangerment. The trial judge sentenced him on all charges relating to the attack on Good and the January 12, 1999 hotel incident to an aggregate term of four and a half to nine years imprisonment. (N.T. June 11, 1999 at 2:7-25).

In his direct appeal, Petitioner argued that: 1) the evidence was insufficient to support a conviction for aggravated assault; 2) his trial counsel was ineffective for failing to challenge a juror, and for failing to object to the prosecution's opening and closing statements; and 3) the trial court

violated the Sixth Amendment right to confrontation by precluding Kerwin from cross-examining Good with his criminal record. Commonwealth v. Kerwin, 778 A.2d 1244 (Pa. Super. 2001). The Superior Court affirmed, ruling, *inter alia*, that the trial judge did not abuse his discretion in excluding Good's record. Id. The Pennsylvania Supreme Court denied *allocatur*. Commonwealth v. Kerwin, 567 Pa. 738, 788 A.2d 374 (Pa. 2001).

Petitioner filed his first habeas petition in the Middle District of Pennsylvania. See Kerwin v. Varner, 2003 U.S. Dist. LEXIS 14859, *4 (2003). On October 11, 2002, he re-filed his petition in this Court, which denied without prejudice for failure to exhaust state remedies. See Kerwin v. Varner, 2003 U.S. Dist. LEXIS 14741 (E.D. Pa. 2003) (adopting the Magistrate's Report and Recommendation, published at Kerwin v. Varner, 2003 U.S. Dist. LEXIS 14859 (E.D. Pa. 2003)). After curing this procedural defect, Petitioner filed this *pro se* petition, arguing that: the exclusion of Good's record violated Kerwin's right to confrontation under the Sixth and Fourteenth Amendments of the United State Constitution; and 2) trial counsel's failure to object to the prosecutor's opening and closing remarks amounted to Sixth Amendment ineffectiveness. (Pet.'s Br. at 1).

The matter was referred to a Magistrate Judge, who concluded that: the limitations on Good's cross-examination did not violate Petitioner's confrontation rights; if the limitation was erroneous, it was a harmless error; Kerwin could not show that his counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms; and Petitioner could not show that the allegedly inadequate representation prejudiced his defense. Accordingly, the Magistrate recommended that I deny habeas relief.

On February 10, 2005, Petitioner objected only to the Magistrate's rejection of his

contentions respecting the exclusion of Good's criminal record. (Pet.'s Obj. at 9).

STANDARD OF REVIEW

The extent of a District Court's review of a Magistrate Judge's Report is within the Court's discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa. 1994); see also Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). A District Court must review *de novo* portions of the Report to which objection is made. 28 U.S.C. § 636(b)(1)(c) (2004); see generally, Goney v. Clark, 749 F.2d at 7. A District Court may "accept, reject or modify, in whole or in part, the magistrate's findings or recommendations." Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001).

The District Court is obligated to construe the contentions in a *pro se* petition liberally, and so ensure the maximum permissible review of the claims brought. See e.g., Hunterson v. DiSabato, 308 F.3d 236, 243 (3d Cir. 2002); Hamilton v. Holt, 2004 U.S. Dist. LEXIS 27275, *3 (E.D. Pa. 2004).

DISCUSSION

The Antiterrorism and Effective Death Penalty Act requires federal courts collaterally reviewing state court proceedings to give considerable deference to state courts' legal and factual determinations. See P.L. 104-132, 110 Stat. 1214; see also Lambert v. Blackwell, 387 F.3d 210, 234 (3d Cir. 2004). A federal court may grant a state prisoner habeas relief "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); see also Hill v. United States, 368 U.S. 424, 428 (1962) (habeas relief is appropriate to cure "a fundamental defect that inherently results in a complete miscarriage of justice, [or] in an omission

inconsistent with the rudimentary demands of fair procedure.”). “Both the historic nature of the writ and principles of federalism preclude a federal court’s direct interference with a state court’s conduct of state litigation.” Barry v. Brower, 864 F.2d 294, 300 (3d Cir. 1988) (citing Wainwright v. Sykes, 433 U.S. 72, 81, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977)).

A federal habeas court may overturn a state court’s legal determinations only if the state court’s ruling was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. 2254 § (d)(1). A state court’s decision is “contrary to clearly established federal law” if the state court either “contradicts the governing law set forth in [the Supreme Court’s] cases” or “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result.” Williams v. Tayler, 529 U.S. 362, 405-06, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000); see also Hackett v. Price, 381 F.3d 281, 286 (3d Cir. 2004). An “unreasonable application” of federal law occurs only if the state court “identifies the correct governing legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular . . . case” or “unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” Williams, 529 U.S. at 407; Lambert, 387 F.3d at 235.

A state court’s factual determinations “shall be presumed to be correct.” 28 U.S.C. § 2254(e)(1); Lambert, 387 F.3d at 235. Only if a state court’s decision based on a factual determination is “unreasonable in light of the evidence presented in the state court proceeding” should habeas relief be granted. Lambert, 387 F.3d at 235; see also Miller-El v. Cockrell, 537 U.S. 322 (2003) (“a decision adjudicated on the merits in a state court and based on a factual

determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.”).

Petitioner alleges that the trial judge’s exclusion of Good’s criminal record violated Petitioner’s Sixth Amendment right to confront Good. I can find absolutely no authority to support the contention that a defendant’s right to confrontation extends to the scope of examination allowed as to a witness called by the defendant himself. See United States ex rel. Boelter v. Cuyler, 486 F. Supp. 1141, 1167 (E.D. Pa. 1980) (“The Sixth Amendment right to confrontation is embodied largely by the right to cross-examine adverse witnesses”) (internal quotations omitted); see e.g., State v. Askew, 53 Conn. App. 236, 238, 729 A.2d 238 (Conn. App. Ct. 1999) (“We are not furnished with any authority, nor are we aware of any, to reverse a case when a defendant is unable to obtain, from his own witness, the testimony that he wanted.”).

Even if I were to apply those decisions regarding a defendant’s Sixth Amendment right fully to cross-examine a prosecution witness, it is evident that Kerwin is not entitled to relief here. To prove a denial of his right to confrontation, Petitioner must establish that he could not show that the witness was biased, and was prohibited from exposing “to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.” United States v. Chandler, 326 F.3d 210, 222 (3d Cir. 2003) (citing Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986)). Here, the trial judge decided that the prejudicial nature of Good’s criminal record outweighed its probative value. Under Pennsylvania law, this was certainly within the judge’s discretion. Pa. R.E. 403; Clinton v. Giles, 719 A.2d 314, 318 (Pa. Super. 1998). It hardly rises to a federal constitutional violation warranting habeas relief. This is especially true because Petitioner was able to attack Good’s credibility through the testimony of other witnesses. Accordingly, based

on the record as a whole, I find that the trial judge's ruling was neither "contrary to [nor involved] an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d)(1); see e.g., Van Arsdall, 475 U.S. at 680 (right to confrontation is denied when party is unable to challenge the reliability of the witness).

Finally, it is apparent that the limitation on Good's impeachment did not harm Petitioner. Id. at 684-85 (even if confrontation clause violation occurred, "correct inquiry is whether assuming that the damaging potential of the cross examination were fully realized, a reviewing court might nonetheless say that the error is harmless beyond a reasonable doubt."). The evidence against Petitioner was substantial: DNA testing revealed that the hammer Petitioner threw into the woods was covered in Good's blood; the friend who helped Petitioner flee testified that Kerwin admitted that he had attacked Good; and, Petitioner aggressively tried to elude the police, even threatening them with a gun when they tried to arrest him. (N.T. April 28, 1999; N.T. April 29, 1999); see e.g., Van Arsdall, 475 U.S. 673, 674 (1986) (in reviewing confrontation clause allegations, "a court must consider whether that error was harmless in the context of the trial as a whole."). In these circumstances, if the exclusion of Good's criminal record was error, it was certainly harmless. Id. at 684.

In sum, the state courts' limitation on Good's cross-examination does not warrant the grant of habeas relief. In addition, I conclude that the Magistrate's rejection of Kerwin's ineffectiveness claim -- a ruling to which he has not objected -- was also correct. Accordingly, I overrule Petitioner's objections, and adopt the Magistrate's Report and Recommendation.

An appropriate order follows.

Paul S. Diamond, J.

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ORDER

AND NOW, this 8th day of April, 2005, upon consideration of the petition for writ of habeas corpus, Respondent's answer, the Report and Recommendation of Magistrate Judge Carol Sandra Moore Wells, Petitioner's Objections to the Report and Recommendation and the related responses, it is ORDERED and DECREED:

1. Petitioner's Objections to the Report and Recommendation are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED; and
3. The petition for a writ of habeas corpus is DENIED.

The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

Paul S. Diamond, J.